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No.

In the Supreme Court of the United States

October Term, 198

In re: WIRE CLOTH ENTERPRISES, INC.,
Bankrupt

REED, SMITH, SHAW & McCLAY,
Respondent

vs.

WIRE CLOTH ENTERPRISES, INC.,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

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1. Does 28 U.S.C. 1471(d), enacted November 6, 1978 and effective April 1, 1984, revoke absolutely the power of a United States Court of Appeals to review an abstention decision of a Bankruptcy or Federal District Court after April 1, 1984?

2. Does *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, June 28, 1982, 102 S.Ct. 2858, 2871, 2878, 458 U.S. 50, 71, 84 bar trial of a claim founded on debtor-creditor contract breach by a Bankruptcy Judge?

3. Did the Bankruptcy Judge use proper discretion in deciding to abstain in this case and did the District Judge properly refuse to overrule him?

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Opinions Below

IN THE SUPREME COURT OF THE UNITED STATES

REED SMITH SHAW AND McCLAY

Respondent

v.

WIRECLOTH ENTERPRISES, INC.,

Petitioner

PETITION FOR A WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Wirecloth Enterprises, Inc. respectfully presents this petition for allowance of certiorari to the United States Court of Appeals for the Third Circuit.

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW

The May 28, 1982 order and opinion of Bankruptcy Judge Gerald K. Gibson entered at No. 75-1060, Bankruptcy, Western District, Pennsylvania, is unreported so a copy is appended to this petition (1a-6a).

Opinions Below

The November 3, 1982 order of District Judge Paul A. Simmons is unreported, No. 82-1391, Western District, Pennsylvania, so a copy is appended to this petition (8a).

The January 19, 1983 order of District Judge Paul A. Simmons, No. 82-1391, Western District, Pennsylvania, is unreported so a copy is appended to this petition (9a).

The April 9, 1984 opinion of the United States Court of Appeals for the Third Circuit, No. 83-5131, is unreported so a copy is appended to this petition (10a).

The May 4, 1984 order denying rehearing and/or rehearing in banc is unreported so a copy is appended to this petition (16a).

JURISDICTION

Jurisdiction of the Supreme Court of the United States is given by 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

28 U.S.C. 1471(d) directs:

"(d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under Title 11 or arising in or related to a case under Title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise."

The note to this section says:

"Chapter effective April 1, 1984, see Section 402(b) of Pub. L. 95-598, set out as a note preceding Section 101 of Title 11, Bankruptcy."

CONCISE STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTION PRESENTED

After this bankruptcy case was closed, the assets distributed and the Bankrupt plus its trustees discharged, Reed, Smith, Shaw and McClay, Esquires (the lawyers) had it reopened on a single issue.

They wanted a $39,108.40 fee for services allegedly performed for Wirecloth Enterprises, Inc. (the Client) in the Court of Common Pleas of Allegheny County, Pennsylvania (the State Court).

When the Client objected to Bankruptcy Court jurisdiction because of *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 1982, 102 S.Ct. 2558, 458 U.S. 50, and demanded a jury trial, the Bankruptcy Judge sent the fee issue to State Court for trial and the United States District Judge, after the Lawyers appealed, said he had no jurisdiction to do anything about it.

In sum, the Bankruptcy Judge and the District Judge abstained.

The Lawyers then appealed to the United States Court of Appeals for the Third Circuit.

While the appeal was pending, 28 U.S.C. 1471(d) became effective as of April 1, 1984.

The Circuit Court panel did not render its decision until April 9, 1984 even though the Client's motion to quash on 28 U.S.C. 1471(d) grounds had been argued orally before the panel on January 26, 1984.

Client's timely petition for reargument and reargument in banc was denied May 4, 1984.

The issues are now respectfully presented to the United States Supreme Court by this petition for certiorari.

REASONS FOR ALLOWANCE OF THE WRIT

1 Does 28 U.S.C. 1471(d), enacted November 6, 1978 and effective April 1, 1984, revoke absolutely the power of a United States Court of Appeals to review an abstention decision of a Bankruptcy or Federal District Court after April 1, 1984?

A. In an unreported case at Nos. 82-5414, 5415, 5778, 5779, a panel of the United States Court of Appeals for the Third Circuit (Higginbotham and Becker, Circuit Judges, and Stapleton, District Judge, "sitting by designation", *Kings Inn Motel et al. v. Plaza Vending et al.*) sua sponte quashed appeal from an 18 U.S.C. 1447(d) remand order because that statute, having language identical to 28 U.S.C. 1471(d) (". . . is not reviewable on appeal or otherwise"), was a complete jurisdictional blockade regardless of the issues raised.

(1) Cited were *Ex Parte McCardle,* 74 U.S. (7 Wall.) 506, 514 (1868), and *Sidivy v. Richardson,* C.A. 3, 1973, 485 F.2d 1115, 1123, Adams, C. J., concurring.

(2) The panel said: "To the contrary, it is axiomatic that the Court always has authority to determine whether jurisdiction exists." Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the case.

(3) The United States Court of Appeals, itself, has observed that one panel should not overrule another on the same legal issue. *Mobay Chemical Corp. v. Castle,* 1981, C.A. 3, 682 F.2d 419.

B. "It is axiomatic, as a matter of history as well as doctrine, that the existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute." *Carroll v. U. S.,* 1957, 77 S.Ct. 1332, 1336, 354 U.S. 394, 399; *De la Rama v. U. S.,* 1953, 73 S.Ct. 381, 383, 344 U.S. 386, 390 ("when the very purpose of Congress is to take away jurisdiction, of course, it does not survive even as to pending suits, unless expressly reserved"), citing *Bruner v. U. S.,* 1952, 343 U.S. 112, 116-117, 72 S.Ct. 581, 584 (jurisdiction of District Courts revoked as forum for federal employee compensation claims including pending cases), and *United States v. Security Industrial Bank,* 1982, U.S. , 103 S.Ct. 407, 413, f.n. 10 (Supreme Court avoids constitutional issue of retroactivity effect of Bankruptcy Reform Act in re lien removal by holding act not retroactive but distinguishes *Dickinson Industrial Site, Inc.,* 1940, 309 U.S. 382, 383, 60 S.Ct. 595, 596, where an appeal rule passed after a bankruptcy case was filed was applied to it retroactively by a unanimous decision).

"No one has a vested right in any given mode of procedure." *The Denver and Rio Grande Western R.R. Co. v. Brotherhood of R.R. Trainmen,* 1967, 376 U.S. 556, 563, 87 S.Ct. 1746, 1750; *McGee v. International Life Ins. Co.,* 1957, 355 U.S. 220, 224, 78 S.Ct. 199, 201 (defendant has no vested right to be sued only where it can be served; new procedure allowing service by registered mail in

Texas on California contract suit which predated statute held remedial, not substantive).

Removal of appellate jurisdiction ousts appellate court jurisdiction even for cases already on appeal. *Merge v. Trausi,* C.A. 3, 1968, 394 F.2d 79 ("the Court loses all jurisdiction even in a case already pending, when Congress amends the governing statute by taking jurisdiction from the courts"); *De Rodulfa v. U. S.,* 1972, C.A. D.C., 461 F.2d 1240, 1251, 1253 (statute amended while case on appeal ends jurisdiction, "the suit is pending until the appeal is disposed of"), cited with approval in *Pollard v. Romney,* C.A. 3, 1975, 512 F.2d 295, 298, f.n. 13.

Petitioner respectfully suggests this case is just like one where a judge hears the evidence but dies before he makes a decision. *Arrow-Hart, Inc. v. Carey,* C.A. 6, 1977, 552 F.2d 711, 713 (new trial required unless all parties agree substitute judge can decide from transcript of trial).

C. The Lawyers filed their notice of appeal on February 18, 1983 and received notice from the Court of Appeals that the case had been docketed on February 28, 1983.

28 U.S.C. 1471(d) with its April 1, 1984 jurisdiction ousting provision was published in all statute books and no reason has been given why this decision was made after the Court no longer had the power to make it.

The panel's f.n. 1 opinion observation (12a-13a) that "Wirecloth's motion to quash will be denied because proceedings filed before the effective date of the Bankruptcy Reform Act are governed by the Bankruptcy Act of 1898, the statute under which Wirecloth filed its petition for

arrangement'' is contrary to the effective date provisions of the Congress and the cases cited supra and should be overruled.

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2. Does Northern Pipeline Construction Co. v. Marathon Pipeline Co., June 28, 1982, 102 S.Ct. 2858, 2871, 2878, 458 U.S. 50, 71, 84, bar trial of a claim founded on debtor-creditor contract breach by a Bankruptcy Judge?

Client respectfully suggests that Bankruptcy Judge Gibson has no power or jurisdiction to try this claim in which Lawyers ask fees for services rendered in State Court before this bankruptcy case was filed because he is not an Article III Judge and the demand is founded on creditor-debtor contract.

In addition, summary trial before him will deprive client of its right to a jury trial given by Article I, Section 6, of the Pennsylvania Constitution which says: ''Trial by jury shall be as heretofore and the right thereof remains inviolate.''

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3. Did the Bankruptcy Judge use proper discretion in deciding to abstain in this case and did the District Judge properly refuse to overrule him?

A. This bankruptcy case was closed on March 21, 1979. The Lawyers, who made a February 15, 1980 motion to reopen so they could obtain fees for work performed in the State Court previous to their filing the bankruptcy petition for Client, had already received without objection

$12,386.70 for work performed in this bankruptcy case; i.e., they served as counsel for the bankrupt Client in this bankruptcy and also are postured as a creditor against the bankrupt estate.

There are at least eleven lawyers, with ten of whom Client had no contract, claiming quantum meruit compensation at what each calls his regular billing rate for State Court services which Client disputes and says were not performed in a workmanlike manner and unnecessary.

The trustee-receivers were discharged on December 22, 1978. All assets have been distributed.

There is nothing in the Bankruptcy Estate from which the Lawyers can collect any award so the claim is, in effect, a contract suit in quantum meruit against a former client who is no longer in bankruptcy.

If Lawyers receive an award, the only source of payment will be against assets of the client who is no longer in bankruptcy.

Client respectfully suggests that if ever there was a case for State Court disposition, this is the one.

B. Client respectfully suggests the 28 U.S.C. 1471-(d) standard to abstain is "in the interest of justice" and that Judge Gibson's and Judge Simmons's decisions were not "clearly erroneous." *In re Morrissey,* C.A. 3, 1983, as amended October 4, 1983, 717 F.2d 100, 104.

C. The Lawyers' claim for services referred to on the first page of the Circuit Court's opinion (11a) was never properly contested. Only Edmund K. Trent, Esq., appeared and Stephen P. Laffey, Esquire, who represented Client, was ill and died shortly thereafter.

In effect, the case went by default without real opposition and, of course, without the required transcript (see page one of Circuit Court opinion, 11a) cannot be evaluated in re whether Mr. Trent's testimony supported the fee request of at least eleven lawyers from his firm.

In any event, this award has been set aside and must be proved again in what will be a truly adversary proceeding which can best and should be decided in the State Court where the services were rendered and which can best determine and evaluate all elements involved.

CONCLUSION

The Supreme Court of the United States should allow certiorari and set this case for briefing and oral argument.

Respectfully submitted,

ALLEN N. BRUNWASSER
Attorney for Petitioner

APPENDIX

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In Proceedings for an Arrangement under Chapter XI

No. 75-1060

IN THE MATTER OF: WIRE CLOTH ENTERPRISES, INC., Debtor

MEMORANDUM OPINION

The matter presently before the Court is Wire Cloth Enterprises, Inc., 75-1060; a petition filed in 1975 under Chapter XI of the Bankruptcy Act. The issue presented herein involves a claim for pre-petition legal fees incurred by counsel for the debtor in a prior state court receivership proceeding. The Court is asked to determine the forum in which the disputed and unliquidated claim for legal fees can most expeditiously be liquidated.

The case at bar has a long and complicated history. The Petition for Arrangement under Chapter XI of the Bankruptcy Act was filed in 1975, prior to the enactment of the Bankruptcy Code. Accordingly, the provisions of the Bankruptcy Act are controlling.

The claim for pre-petition legal fees arises out of the following events. Wire Cloth Enterprises, Inc., is a business engaged in the purchase and resale of wire cloth and other products used in the screen printing business. In November, 1974, one of Wire Cloth's creditors filed a petition in the Court of Common Pleas of Allegheny County which resulted in the appointment of a receiver. Shortly thereafter, the Court of Common Pleas ordered the immediate liquidation of Wire Cloth Enterprises, Inc. Subsequently, the Superior Court of Pennsylvania ordered a stay of liquidation, and directed the continuation of the business. Wire Cloth was represented by Attorney Edmund Trent, of the law firm of Reed, Smith, Shaw and McClay, hereinafter "Reed Smith", during the state court proceeding.

On December 22, 1975, Mr. Trent filed a Petition for Arrangement under Chapter XI of the Bankruptcy Act in the United States District Court for the Western District of Pennsylvania on behalf of Wire Cloth. The petition alleged that the state court receivers had impeded the profitable operation of the business, and prayed for injunctive relief. On December 24, 1975, Judge Louis Rosenberg appointed two receivers and trustees with full power to conduct and administer the business. On December 7, 1976, the co-receivers submitted two plans of arrangement. Attached to both was a summary of debtor's liabilities, wherein the claim of Edmund Trent for legal services was listed as follows: "to be held in abeyance until disposition of other creditors' claims." Neither plan provided for the retention of jurisdiction. Plan B was accepted by the majority of creditors both as to number and amount, including Edmund Trent on behalf of Reed

Smith. On January 17, 1977, the Court confirmed Plan B, which provided for payment of all unsecured creditors (with the exception of one creditor not a party herein) in full satisfaction of all claims on the basis of 75% of indebtedness within thirty days of confirmation of said arrangement.

On February 15, 1978, the case was referred to this Court for further consideration and disposition. Edmund Trent and Craig Jones, of Reed Smith, filed an application for compensation and reimbursement, alleging the following fees for legal services rendered:

Prior to November, 1974	$ 9,340.00
January 1, 1975 to June 28, 1975	$12,842.95
June 30, 1975 to September 16, 1975	$ 6,767.55
September 16, 1975 to November 30, 1975	$ 1,981.50
December 1, 1975 to February 28, 1977	$17,617.65

Wire Cloth filed an objection to the petition, alleging that the debtor did not actually retain Reed Smith during the state court receivership. Rather, Reed Smith entered the proceeding to protect fees already owed.

On November 2, 1978, a hearing was held on Trent's petition for counsel fees incurred during the Chapter XI proceedings. This Court found that the fair and reasonable fee for post-petition legal services rendered was $12,386.07, and directed payment of the same as part of the administration of the estate.

On December 22, 1978, the Court entered an order discharging the receivers, and on March 21, 1978, the estate was closed.

Some months later, Reed Smith moved for the reinstatement of the receivers and for specific performance of a settlement agreement allegedly reached by Reed Smith and the debtor for payment of the pre-petition legal fees.

In its motion, Reed Smith alleges the existence of pre-petition legal fees in the amount of $39,108.40; or $29,331.13 on the basis of 75% payment of unsecured debts as provided for in Plan B. Reed Smith alleges that it entered into an agreement whereby Wire Cloth agreed to pay $28,000 in fourteen monthly installments as full payment of the debt. Reed Smith sought a security interest in the debtor's inventory. Reed Smith further alleges that despite repeated demands by Mr. Trent, Wire Cloth's president neither signed nor returned the settlement agreement, promissory note, or security agreement. On that basis, Reed Smith prays for reinstatement of the receivership, and specific performance of the settlement agreement. On the same date, Reed Smith also moved to reopen the estate.

On April 3, 1980, a hearing was held on the Motion to Re-open, and an order was entered denying the same. The order also allowed the claim of Reed Smith as a general claim in the amount of $39,108.40. From the order allowing the claim, Wire Cloth appealed to the District Court. Among the issues raised were the jurisdiction of the bankruptcy court to determine the allowance of fees; the reasonableness of the amount charged; and the quality of services rendered.

Reed Smith filed an amended application for compensation. The debtor has moved to dismiss the claim on the basis of lack of jurisdiction.

For the reasons that follow, the Court concludes that the disputed and unliquidated claim of Reed Smith for pre-petition legal fees can most expeditiously be litigated in state court.

It is clear that the jurisdiction of the Bankruptcy Court to allow or disallow creditors' claims in a bankruptcy proceeding is exclusive of all other courts. *Prudence Realization Corp. v. Geist*, 316 U.S. 89 (1942). However, in its exercise of discretion, the Bankruptcy Court may conclude that it is desirable to have the litigation proceed in state court. *Ex. Parte Baldwin*, 291 U.S. 610 (1934). Although there are certain administrative functions which cannot be delegated, "the very quintessence of exclusive jurisdiction . . . is to be able to permit the state court to try a certain issue when . . . the state court is in a better position to determine the same expeditiously." *In re American Fidelity Corp.*, 28 F. Supp. 462 (S. D. Cal. 1939).

Further, §57(d) of the Bankruptcy Act acknowledges that the Court, in its discretion, may direct the liquidation of a claim in another forum. The section provides, in pertinent part, that "an unliquidated or contingent claim shall not be allowed unless liquidated or the amount thereof estimated *in the manner* and within the time directed by the court." (emphasis added) As stated in Collier on Bankruptcy on the present issue:

> (The Bankruptcy Court) in its sound discretion alone decides whether and how a claim, contingent or otherwise unliquidated at the time when the petition in bankruptcy was filed, shall be liquidated. The Bankruptcy Court has exclusive jurisdiction to

direct the manner and time in which such a claim is to be liquidated and estimated as to its amount. 3 Collier on Bankruptcy, 57.15 [3.2] (14th Ed. 1977).

After careful consideration of the facts presented herein; relevant case law; and §57(d) of the Bankruptcy Act; the Court concludes that the disputed claim for pre-petition legal fees incurred during state court proceedings should most appropriately be litigated in the state court.

An appropriate order will be entered.

(s) Gerald K. Gibson
Gerald K. Gibson
Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

In Proceedings for an Arrangement under Chapter XI

No. 75-1060

IN THE MATTER OF: WIRE CLOTH ENTERPRISES, INC., Debtor

ORDER OF COURT

At Pittsburgh in said district this 2nd day of June, 1982

It is hereby ORDERED and DECREED that the claim for pre-petition legal fees filed on behalf of Reed, Smith, Shaw & McClay be and is hereby directed to be litigated in the Court of Common Pleas of Allegheny County in accordance with the foregoing opinion.

(s) Gerald K. Gibson
Gerald K. Gibson
Bankruptcy Judge

Order, Nov. 3, 1982

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-1391

Bankruptcy No. 75-1060

IN RE: WIRE CLOTH ENTERPRISES, INC.,
Bankrupt

REED, SMITH SHAW & McCLAY,
Plaintiff

vs

WIRE CLOTH ENTERPRISES, INC.,
Defendant

ORDER OF COURT

AND NOW, this 3rd day of November, 1982, after argument IT IS HEREBY ORDERED that the above case is dismissed without prejudice for lack of jurisdiction.

(s) Paul A. Simmons
United States District Judge

Order, Jan. 19, 1983

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 82-1391
Bankruptcy No. 75-1060

IN RE: WIRE CLOTH ENTERPRISES, INC.
Bankrupt

REED, SMITH, SHAW & McCLAY,
Plaintiff

vs

WIRE CLOTH ENTERPRISES, INC.,
Defendant

ORDER OF COURT

AND NOW, this 19th day of January, 1983, IT IS HEREBY ORDERED that the prayer of the Petitioner requesting an Order of Mandamus on the Honorable Gerald Gibson is denied without prejudice to the right of Petitioner Reed, Smith, Shaw and McClay to proceed on their claim in the State Court as Ordered by Judge Gibson. The Court refuses to vacate its Order dated November 3, 1982 inasmuch as under Judge Gibson's Order, the State Court now has jurisdiction of the matter.

(s) Paul A. Simmons
United States District Judge

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-5131

In Re: WIRE CLOTH ENTERPRISES, INC.
Bankrupt.

REED, SMITH, SHAW & McCLAY,
Appellants

v.

WIRE CLOTH ENTERPRISES, INC.

On Appeal From the United States District Court for the Western District of Pennsylvania

(C. A. No. 82-1391)

Argued January 26, 1984

Before: ADAMS, GARTH, *Circuit Judges,* and COHEN, *District Judge**

(Filed Apr. 9 1984)

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* Hon. Mitchell H. Cohen, United States District Court for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

PER CURIAM.

In 1975, Wire Cloth Enterprises filed a petition under Chapter XI of the Bankruptcy Act of 1898. Following the acceptance of a plan of arrangement, Wire Cloth filed a petition praying that it be discharged from court supervision. The law firm of Reed Smith Shaw & McClay (Reed Smith) filed an answer to Wire Cloth's petition, listing various unpaid statements for legal services rendered prior to and during the Chapter XI proceedings.

Following a hearing in November 1978, the bankruptcy court allowed most of Reed Smith's claim for legal services rendered during the bankruptcy proceeding, but was silent on the claim for fees and expenses incurred prior to the petition for arrangement. *In the Matter of Wire Cloth Enterprises, Inc.*, No. 75-1060 (W.D. Pa. Nov. 2, 1978). After Reed Smith filed a motion to reopen the debtor's estate, the bankruptcy court allowed the firm's claim for $39,108.40, explaining that through an "oversight" the court had "inadvertently failed to enter a formal order" allowing the claim at the earlier proceeding. *In the Matter of Wire Cloth Enterprises, Inc.*, No. 75-1060 (Bankr. W.D. Pa. Apr. 3, 1980).

Wire Cloth appealed this decision to the district court, which remanded the case back to the bankruptcy court on the ground that since a transcript of the November hearing had not been made, it was unable to review the matter. The district judge ordered that an "on-the-record

hearing de novo" be held "as to both factual and legal issues involved in this claim." *Wire Cloth Enterprises Inc. v. Reed, Smith, Shaw & McClay,* No. 80-575 (W.D. Pa. Nov. 13, 1980).

Upon remand, Wire Cloth filed a motion to dismiss Reed Smith's claim because the bankruptcy court lacked jurisdiction. Without holding that it lacked jurisdiction, the bankruptcy court granted this motion and ordered that the claim for pre-petition legal fees be litigated in the Court of Common Pleas of Allegheny County. *In the Matter of Wire Cloth Enterprises,* No. 75-1060 (Bankr. W.D. Pa. June 2, 1982). The district court dismissed Reed Smith's appeal of that order for lack of jurisdiction. *Wire Cloth Enterprises v. Reed, Smith, Shaw & McClay (In re Wire Cloth Enterprises, Inc.),* No. 82-1391 (W.D. Pa. Nov. 3, 1982). Reed, Smith then made a motion to the district court, seeking both an order of mandamus and the vacation of the district court's previous order of dismissal for lack of jurisdiction. That motion was denied by the district court on January 19, 1983. *Wire Cloth Enterprises v. Reed, Smith, Shaw & McClay (In re Wire Cloth Enterprises, Inc.),* No. 82-1391 (W.D. Pa. Jan. 19, 1983). Reed, Smith filed a timely notice of appeal with this court from the January 19, 1983 order. Our jurisdiction is grounded in 28 U.S.C. §1291.[1]

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[1] Wire Cloth has moved to quash the appeal under 28 U.S.C. §1471(d) (Supp. V 1981), which provides that a bankruptcy court may, in the interests of justice, abstain from hearing a particular proceeding arising under Title 11 and that a decision to abstain in such circumstances is unreviewable on appeal. Wire Cloth's motion to quash will be denied because proceedings filed before the effective date of the Bankruptcy Reform Act are gov-

I.

Although federal bankruptcy courts have exclusive jurisdiction over claims brought against the estate of the bankrupt, bankruptcy courts may consent, under "exceptional" circumstances, to a state court's determination of issues that could properly be adjudicated in the bankruptcy proceedings. *Mangus v. Miller,* 317 U.S. 178, 186 (1942). Such exceptional circumstances have been found when a state court could resolve the disputed claim more rapidly than the bankruptcy court. *See, e.g., Submeyer v. Crawley* (*In re Interstate Stores,*) 551 F.2d 1332 (2d Cir. 1977); *Poinsett Lumber Mfg. Co. v. Drainage Dist. No. 7,* 119 F.2d 270 (8th Cir. 1949). When bankruptcy proceedings implicate related claims hinging on unsettled questions of state law, a stay of the bankruptcy proceedings pending resolution of the dispute in state court has also been deemed proper. *See Mangus, supra,* 317 U.S. at 185-86; *Thompson v. Magnolia Petroleum Co.,* 309 U.S. 478, 483 (1940).

The discretion of the bankruptcy court to refer claims to a state court, however, is not without limit. In *In re J. Rosen & Sons,* 130 F.2d 81 (3d Cir. 1942), for instance, this Court reversed a district court order authorizing a state mortgage foreclosure proceeding against a bankrupt. The district court and the bankruptcy referee had in effect left to the state court the task of determining the

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erned by the Bankruptcy Act of 1898, the statute under which Wire Cloth filed its petition for arrangement. *See* Bankruptcy Reform Act §403, Pub. L. 95-598, 92 Stat. 2683 (1978). The 1898 Act has no provision corresponding to §1471(d) as is made clear by the several cases reviewing abstention decisions that are discussed in this opinion.

validity of the contested mortgage because the dispute would involve the parties in "extended litigation which cannot be speedily determined." *Id.* at 84. The panel reasoned that the validity of the mortgage should have been promptly determined by the bankruptcy court because the controversy did not involve unsettled questions of state law. *See also Marian Corp. v. Bray,* 235 F.2d 318 (4th Cir. 1956) (claim will not be referred to state court when legal question can be settled in bankruptcy court); *Hicks v. Thomson (In re Chicago & N.W. Ry. Co.),* 127 F.2d 1001 (7th Cir. 1942) (same); I *Collier on Bankruptcy* §2.07 at 159-67 (14th ed. 1977).

II.

The validity of Reed Smith's claim for pre-petition fees and expenses has already been heard and decided. It was only through an "oversight" that the claim was not included in the bankruptcy court's order of November 2, 1978. That oversight was corrected in the order of April 3, 1980. Nothing in the record indicates that Reed Smith's claim involves unsettled questions of state law or that the claim could not be expeditiously settled by a court that has been involved with the Wire Cloth bankruptcy petition for eight years.

On appeal from the April 3d order, the district court remanded the cause so that a proper record could be made for review. That decision was reasonable, but it does not provide a sufficient basis for the bankruptcy court to abstain from exercising its jurisdiction.

III.

As the cases cited-above make clear, the district court does have the power to review the bankruptcy court's de-

cision to refer the claim for legal fees to a state court. Thus, the district court's holding that it had no jurisdiction to force the bankruptcy judge to conduct a hearing was clearly without merit.[2]

Accordingly, we will vacate the district court's order of January 19, 1983, which disclaimed jurisdiction over the bankruptcy court's decision to refer the matter to the state court. In light of this disposition, we do not find it necessary to address the issue of mandamus. The district court should remand the case to the bankruptcy court so that a proper record can be made, should it prove necessary for the district court to review the bankruptcy court's decision as to Reed Smith's claim. Hopefully, the remand to the bankruptcy court will make it possible for this prolonged litigation to be expeditiously concluded.

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[2] The district court concluded:

> Now under those circumstances, this Court has no power in the premises, inasmuch as the Bankruptcy Judges have remanded the case to the Court of Common Pleas of Allegheny County. This Court has no jurisdiction over this matter, and because the Court has no jurisdiction, on this state of the record, since there is no record upon which this Court may affirm, modify or reverse the Referee Judge's order, since the Referee has refused to follow the instructions heretofore given by this Court involving this transaction, so the Court feels that it has no jurisdiction to force or compel the Bankruptcy Judge to give a hearing; and in as much as the Bankruptcy Judge has transferred the case to the Court of Common Pleas of Allegheny County, it seems that that Court would now have jurisdiction of this matter and this Court has no jurisdiction of this matter.
>
> So, under the circumstances, the Court will dismiss the case without prejudice, for want of jurisdiction.

App. 273a.

Order, May 4, 1984

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 83-5131

In re: WIRE CLOTH ENTERPRISES, INC.,
Bankrupt

REED, SMITH, SHAW & McCLAY,
Appellant

v.

WIRE CLOTH ENTERPRISES, INC.,
Appellee

(C. A. No. 82-1391)

SUR PETITION FOR PANEL REHEARING OR REHEARING IN BANC

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, HUNTER, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges,* and COHEN, *District Judge**

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* As to panel rehearing only.

Order, May 4, 1984

The petition for panel rehearing or rehearing in banc filed by Appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges in the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for panel rehearing or rehearing in banc is denied.

By the Court,

(s) Arlin M. Adams

Circuit Judge

DATED: May 4, 1984